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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF IDAHO

In Re:	)	Case No. 03-21652
	)	
GERALD and ONA LINDSEY, et al.,	)	MEMORANDUM IN SUPPORT OF
	)	TRUSTEE'S MOTION TO DISMISS
Debtors.	)	OR VACATE NEVAK MINING,
	)	LTD.'S MOTION TO SET ASIDE
	)	ORDER APPROVING COMPROMISE

COMES NOW Ford Elsaesser, Chapter 7 Trustee in the above-entitled action, by and through his attorney of record, Barry McHugh of Elsaesser Jarzabek Anderson Marks Elliott & McHugh, Chtd., and files this Memorandum in support of his Motion to Dismiss or Vacate Nevak Mining, Ltd.'s Motion to Set Aside Order Approving Compromise.

As stated in the Trustee's Response to Motion to Set Aside Order Approving Compromise, Nevak Mining, Ltd. (hereinafter referred to as "Nevak"), failed to file an accompanying brief containing the reasons, points and authorities relied upon in making the motion. *See* Doc. No. 126, p. 2. Local Rule 7.1(f) allows for such a dismissal. "Failure by the moving party to file any documents required to be filed under this rule in

MEMORANDUM IN SUPPORT OF TRUSTEE'S MOTION TO DISMISS OR  
VACATE NEVAK MINING, LTD.'S MOTION TO SET ASIDE ORDER  
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a timely manner may be deemed a waiver by the moving party of the pleading or motion.” Having failed to file a brief supporting the motion, the Court should deem that failure to be a waiver of the motion and deny it, or dismiss it.

Further, the agreement entered into between the parties requires that any disputes be resolved by way of alternative dispute resolution:

7. Nevak agrees to participate in alternative dispute resolution at a mutually agreeable time regarding the bankruptcy estate’s interest in Nevak and all claims against Nevak or by Nevak as set forth in the adversary complaint and answer and counterclaim thereto;

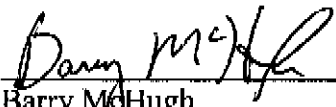
See Affidavit of Brit Groom, inadvertently docketed in Adversary Case No. 04-6098, Doc. No. 273, Exhibit “A” at ¶ 7, and Exhibit “C” at ¶ 7. The “all claims against Nevak or by Nevak” language includes this motion. There is a federal policy favoring alternative dispute resolution. *Gulf Guar. Life Ins. v. Conn. Gen. Life Ins.*, 304 F.3d 476, 492 (5<sup>th</sup> Cir. 2002), citing *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 941 (4<sup>th</sup> Cir. 1999). In the agreement in question, Nevak agreed to resolve any disputes by way of alternative dispute resolution. For that reason, Nevak’s motion should be denied and the matter referred to alternative dispute resolution as agreed to by the parties.

Nevak has not provided sufficient information for the Trustee to adequately prepare to defend the motion. No brief was filed. Although a notice was filed indicating Nevak’s intent to present evidence, no indication as to who the witnesses might be or what the nature of any testimony might be was indicated, and little information regarding exhibits has ever been provided to the Trustee. There is simply a lack of information upon which the Trustee can rely to prepare to litigate this motion. If the Court is unwilling to dismiss the motion outright as requested above, at a minimum the Court

should continue the motion and should require compliance with the Local Rule so that the Trustee can adequately prepare to defend against the motion.

DATED this 15<sup>th</sup> day of October, 2004.

ELSAESSER JARZABEK ANDERSON  
MARKS ELLIOTT & McHUGH, CHTD.

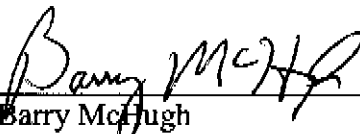
  
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Barry McHugh  
Attorney for Trustee

CERTIFICATE OF SERVICE

I hereby certify that on the 15<sup>th</sup> day of October, 2004, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF TRUSTEE'S MOTION TO DISMISS OR VACATE NEVAK MINING, LTD.'S MOTION TO SET ASIDE ORDER APPROVING COMPROMISE was served upon the following via first class U.S. Mail, postage prepaid:

Ford Elsaesser Chapter 7 Trustee P.O. Box 2220 Sandpoint, ID 83864	U.S. Trustee MK Central Plaza 720 Park Blvd., Suite 220 Boise, ID 83712
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Barry McHugh